(4)

No. 00-1494

In The

Supreme Court of the United States

BALTIMORE RAVENS, INCORPORATED AND NATIONAL FOOTBALL LEAGUE PROPERTIES, INCORPORATED,

Petitioners,

v.

FREDERICK E. BOUCHAT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF BY AMICI CURIAE MOTION PICTURE ASSOCIATION OF AMERICA, INC., RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. AND AMERICAN FILM MARKETING ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LOUIS P. PETRICH
(*Counsel of Record*)
DAVID ARONOFF
LEOPOLD, PETRICH & SMITH, P.C.
2049 Century Park East, Suite 3110
Los Angeles, California 90067-3274
(310) 277-3333

Attorneys for Amici Curiae Motion Picture Association of America, Inc., Recording Industry Association of America, Inc. and American Film Marketing Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT PURSUANT TO RULE 29.6

None of the amici associations has issued shares to the public.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. INTERESTS OF THE AMICI 8

III. REASONS WHY THE PETITION SHOULD BE GRANTED 10

A. The Fourth Circuit's Decision Has So Reduced The Standard To Prove "Access" As To Threaten All Future Attempts To Dispose Of Unmeritorious Claims As A Matter Of Law 11

1. The Decision Is A Dangerous Expansion Of The Corporate Receipt Doctrine 14

2. The Decision Improperly Allows Inferences Of "Access" That Are Contradicted By Direct Denials Of Receipt And Practices Preventing Receipt To Constitute Substantial Evidence Of Copying 16

B. The Fourth Circuit's Alternative Holding That "Striking Similarity" Raises An Inference Of Access And Of Copying Is Bad Science And Threatens To Eliminate "Copying" As An Element of Copyright Infringement 17

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 13

Baxter v. MCA, Inc., 812 F. 2d 421 (9th Cir.), *cert. denied sub nom., Williams v. Baxter*, 484 U.S. 954 (1987) 18

Benson v. Coca-Cola Co., 795 F. 2d 973 (11th Cir. 1986) 10, 17

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) ..4, 13

Bouchat v. Baltimore Ravens, 241 F. 3d 35 (4th Cir. 2001) 1

Bouchat v. Champion Prods., Dkt. No. MJG-99-1576 (D. Md. 1999) 4

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 11, 18, 19

Dimmie v. Carey, 88 F. Supp. 2d 142 (S.D.N.Y. 2000) 15

Eden Toys, Inc. v. Florelee Undergarment Co., 697 F. 2d 27 (2d Cir. 1982) 6

Ellis v. Diffie, 177 F. 3d 503 (6th Cir. 1999) 17

Feist Pubs, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) 12

Ferguson v. National Broadcasting Co., 584 F. 2d 111 (5th Cir. 1978).....10, 17, 18

Financial Information, Inc. v. Moody's Investors Service, 751 F. 2d 501 (2d Cir. 1984)..... 19

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) 7, 9

Goldhirsh Group, Inc. v. Alpert, 107 F. 3d 105 (2d Cir. 1997) 13

TABLE OF AUTHORITIES – Continued

Page

Granite Music Corp. v. United Artists Corp., 532 F. 2d 718 (9th Cir. 1976) 12

Grubb v. KMS Patriots, L.P., 88 F. 3d 1 (1st Cir. 1996)..... 10, 15, 16, 18

Herzog v. Castle Rock Entertainment, 193 F. 3d 1241 (11th Cir. 1999).....10, 17

Jason v. Fonda, 698 F. 2d 966 (9th Cir. 1982) 10

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 4

Kamar Intl., Inc. v. Russ Berrie & Co., 657 F. 2d 1059 (9th Cir. 1981)..... 14

Keeler Brass Co. v. Continental Brass Co., 862 F. 2d 1063 at 1066 (4th Cir. 1988)..... 17

Keene v. Wheatley, 14 F. Cas. 180 (C.C.E.D. Pa. 1861) (No. 7,644) 18

Kongisberg Intl., Inc. v. Rice, 16 F. 3d 355 (9th Cir. 1994)..... 6

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) 18

Mazer v. Stein, 347 U.S. 201 (1954) 1, 12, 17, 19

Meta-Film Assocs., Inc. v. MCA, Inc., 586 F. Supp. 1346 (C.D. Cal. 1984) 10, 15, 17

Mills Music v. Snyder, 469 U.S. 153 (1984) 7

Moore v. Columbia Pictures Indus., Inc., 972 F. 2d 939 (8th Cir. 1992)..... 14

Morrissey v. Procter & Gamble Co., 379 F. 2d 675 (1st Cir. 1967) 15

Morse v. Fields, 127 F. Supp. 63 (S.D.N.Y. 1953)..... 13

TABLE OF AUTHORITIES – Continued

Page

New York Times Co. v. Tasini, Dkt. No. 00-201, *cert. granted*, 69 U.S.L.W. 3316 (11/6/2000) 7

Newton v. National Broadcasting Co., 930 F. 2d 622 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991) 13

Novak v. National Broadcasting Co., 752 F. Supp. 164 (S.D.N.Y. 1990) 15

Peel & Co., Inc. v. Rug Market, 238 F. 3d 391 (5th Cir. 2001) 17

Pennsylvania R.R. Co. v. Chamberlain, 288 U.S. 333 (1931) 16

Repp v. Webber, 858 F. Supp. 1292 (S.D.N.Y. 1994), *reversed on other grounds*, 132 F. 3d 882 (2d Cir. 1997), *cert. denied*, 525 U.S. 815 (1998) 10, 16

Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F. 2d 410 (7th Cir. 1992) 6

Selle v. Gibb, 741 F. 2d 896 (7th Cir. 1984) ... 10, 12, 17, 18

Takeall v. Pepsico, Inc., 809 F. Supp. 19 (D. Md. 1992), *aff'd*, 14 F. 3d 596 (4th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994) 10, 16

Tisi v. Patrick, 97 F. Supp. 2d 539 (S.D.N.Y. 2000) 15

Towler v. Sayles, 76 F. 3d 579 (4th Cir. 1996) 10, 16

Warner Bros. v. American Broadcasting Cos., 720 F. 2d 231 (2d Cir. 1983) 11

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 4

TABLE OF AUTHORITIES – Continued

Page

RULES AND STATUTES:

U.S. Constitution, article I, § 8, clause 8 2

Copyright Act of 1976, as amended, 17 U.S.C. §§ 101, et seq.

17 U.S.C. § 101 6

17 U.S.C. § 201(a)(b) 9

17 U.S.C. § 204(a) 6

17 U.S.C. §§ 502-05 4

Supreme Court Rule 37.6 1

TREATISES:

Paul Goldstein, *Copyright* (2d Ed. 1996)

§ 7.2.1 13

§ 7.2.1.2 5

Melville & David Nimmer, *Nimmer on Copyright* (2000)

Vol. 1:

§ 2.01 2

Vol. 3:

§ 12.10[B][2] 5, 10

§ 12.10[B][3] 5, 10

Vol. 4:

§ 13.01[B] 5, 10, 11, 12

§ 13.02[A] 10, 12, 14

§ 13.02[B] 18

§ 13.03[C] 19

William Patry, *Copyright Law and Practice* (1994) 1, 5, 10, 12, 18

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

Alan Latman, "Probative Similarity As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement", 90 *Colum. L. Rev.* 1187 (1990) 5

Alexander Lindey, "Plagiarism and Originality" (1952) 2

G. Moran, "Tears in Tinseltown," *California Lawyer*, p. 21 (Apr. 2000) 9

Robert Osterberg, "Striking Similarity and the Attempt to Prove Access and Copying in Music Plagiarism Cases," 2 *J. Copyright, Ent. & Sports L.* 85 (1983) 18

Eugene Volokh & Brett McDonnell, "Freedom of Speech and Independent Judgment Review in Copyright Cases," 107 *Yale L.J.* 2431 (1998) ... 3, 4, 5, 14

"Harry Potter and the Court Battle Over Creativity", N.Y. Times, National section, pp. 1, 22 (4/1/2001) 9

I. INTRODUCTION

The Motion Picture Association of America, Inc. (MPAA), the Recording Industry Association of America, Inc. (RIAA) and the American Film Marketing Association (AFMA) ("amici")[1] support the petition for a writ of certiorari to review the October 3, 2000 split decision by a panel of the United States Court of Appeals for the Fourth Circuit, as amended December 28, 2000 (reproduced in the petitioner's Appendix A at 1a-28a) and reported, as corrected, at 241 F. 3d 35 (4th Cir. 2001).*

This case raises important questions concerning the proper gatekeeping role of courts in setting benchmarks for what constitutes substantial evidence of "actual copying" in a copyright infringement case – a requirement that "has, surprisingly, resulted in considerable confusion."[2] The decision below conflicts with decisions of this Court and other circuits, by effectively abandoning any legal standard of proof to infer "access" and by allowing juries to use unsupported inferences to prove copying in the face of uncontradicted evidence to the contrary.

In *Mazer v. Stein*, 347 U.S. 201, 218 (1954), this Court held that despite any similarities, "absent copying, there can be no infringement." Now, this Court is called upon to determine whether alleged *similarity* alone may prove the act of copying. By adopting a "controversial method"[3] to prove copying by a "striking similarity" doctrine

---

* All parties have given their written consents to the filing of this Brief, which consents will be filed with the Court.

[1] As required by Sup. Ct. R. 37.6, *amici* represent that none other than the *amici* have made a monetary contribution to the preparation or submission of this brief, and no counsel for any party has authored any part of this brief.

[2] 1 W. Patry, *Copyright Law and Practice* at 690 (1994) (*"Patry"*).

[3] 1 *Patry*, at 700.

which is a disguised example of "bad science," the decision below would allow liability to be imposed without substantial evidence of access and copying. Such a result would work a "radical upheaval in all of copyright doctrine"[4] – transforming copyright law into patent law, where a defendant must prove its work is "novel" to obtain protection and avoid liability.

Because there are so many reasons other than copying why two works might be similar,[5] copyright law cannot fulfill its mission to " . . . promote the Progress of Science and useful Arts . . . " U.S. Const., art. I, § 8, cl. 8, unless lower courts are given clear direction as to what evidence is required to satisfy the threshold showing of access and actual copying. The decision below subverts the rights of authors to be free from specious claims of infringement based upon nothing more than similarity and speculation about access.

In particular, the Fourth Circuit's affirmance of the jury verdict poses a risk to the multi-billion dollar copyright industries in this country by essentially holding that individuals and companies have no means to avoid an inference of "access" or "actual copying" by insulating creative personnel from unsolicited submissions. The evidence below was undisputed that petitioner NFLP had a written policy of isolating its designers from receipt of unsolicited submissions and that the alleged provider of the copyrighted work to NFLP – the petitioner Ravens – similarly had a policy that all outside submissions of created work were to be returned to the sender. Further,

---

[4] 1 M. & D. Nimmer, *Nimmer On Copyright* § 2.01 at 2-8 to -9 (2000).

[5] Alexander Lindey, *Plagiarism and Originality* (1952) at 25 (listing 15 reasons such as the use by each work of the same or similar theme, that common themes carry common accessories, the use of stereotypes, the use of hackneyed ingredients, the imperatives of convention, use of common source material, and the existence of conventions.

the testimony was uncontroverted that the alleged provider of the plaintiff's work to the Ravens – attorney Moag – had a policy that no outside submissions should ever be forwarded to the Ravens. All hypothetical recipients of the submission denied receipt, and no contrary evidence of receipt existed. If the undisputed existence of these policies at three points in the alleged chain of "access" and denials of receipt does not prevent treating contrary "inferences" as substantial evidence of access and copying, then the artists and companies which institute and follow such policies will nevertheless be subjected to an increased number of baseless claims.

The decision below[6] holds that proof of access by a Company (A) having contacts with a law firm (B), which is in the same building as defendant corporation (C) in Maryland proves that creators (D) working in the New York office of defendant corporation (E) had access to plaintiff's work. In the context of the motion picture and recording industries, such a rule of inferences – in the face of contrary direct denials and firewall practices that contradict the inferences – would effectively eliminate the requirement of access, and functionally change the applicable legal doctrine from "copyright" to "similarity right." This would fundamentally transform copyright

---

[6] Although Respondent's Opposition Brief, at 1-6, asserts a number of evidentiary facts not disclosed or relied upon by the Fourth Circuit's decision, it is of course the Fourth Circuit's express rationale that will have the adverse effect about which *amici* are concerned. Published opinions about the minimum evidence necessary to raise an inference of "access" set benchmarks that impact motions for summary judgment, for directed verdict, for judgment as a matter of law and appellate review. *See* E. Volokh & B. McDonnell "Freedom of Speech and Independent Judgment Review in Copyright Cases", 107 *Yale L. J.* 2431 at 2455-60 (1998).

law (which only prohibits copying) into the law of patents (which prohibits equivalent matter, irrespective of independent creation). See note 4, *supra*.

It is not surprising that commercially successful songs, recordings, movies and television series attract copyright infringement claims. The substantial remedies of the Copyright Act[7] – damages, disgorgement of profits, injunctive relief, destruction and attorneys fees – offer a powerful incentive for suits. Nor should it be surprising that the threat of protracted litigation[8] and large jury verdicts can serve to chill investment of creative efforts and money.

Songs, motion pictures, television programs and books are "speech" entitled to First Amendment protections. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) ("there is no doubt that entertainment, as well as news, enjoys First Amendment protection").[9] In areas other than copyright, such as defamation law, where tort law liability rules put speech at risk, the Courts have fashioned special substantive and procedural rules: burdens of proof are shifted, substantive rules are changed to expand the risk-free sphere of speech, summary adjudication is encouraged, and verdicts are subjected to independent review on appeal. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 502-511 (1984); E. Volokh & B. McDonnell, "Freedom of Speech and Independent

---

[7] Copyright Act of 1976, as amended, §§ 502-05; 17 U.S.C. §§ 502-05.

[8] On June 3, 1999, respondent commenced a companion case against more that 400 defendants – some of them members of *amici* – who are alleged somehow to have used the same logo in sales, broadcasts, displays, etc. *Bouchat v. Champion Prods.*, Dkt. No. MJG-99-1576 (D. Md. 1999).

[9] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (books, newspapers, magazines and movies are forms of expression that do not lose their First Amendment protections because they are sold for profit).

Judgment Review in Copyright Cases," 107 *Yale L.J.* 2431, 2439-41 (1998) ("*Volokh*" hereafter).

Courts have evolved some rules to accommodate free speech interests with copyright law.[10] Thus, the circuit courts have generally agreed that meritless claims could be dismissed as a matter of law where plaintiff failed to show (1) that the subject works were substantially the same in their protectible expression, or (2) that any actionable similarities arose from actual copying. A plaintiff might attempt to prove the latter element, "actual copying," by circumstantial[11] evidence that similarities existed that indicated copying ("probative similarity")[12] and that the creator of defendant's work had a reasonable opportunity to read or hear plaintiff's work ("access") by reason of wide public dissemination or through intermediaries. *See* 3 M. & D. Nimmer, *Nimmer On Copyright*, § 12.10[B][2] & [3] (2000) ("*Nimmer*"). In that case, a lack of "access" would be fatal to the claim.

The decision below threatens to undermine those salutary rules and the nationwide benchmarks adduced by the caselaw regarding the sufficiency of evidence. Although the Fourth Circuit purported to render a narrow, fact-specific decision (App. A at 5a-7a), it also conceded that it was deciding a legal issue: whether the

---

[10] *See* Volokh, 107 *Yale L.J.* at 2439-41.

[11] Although courts routinely state that direct evidence is rarely available, at least one commentator disagrees. A. Latman, "Probative Similarity As Proof of Copying: Toward Dispelling Some Myths In Copyright Infringement", 90 *Colum. L. Rev.* 1187, at 1214 (1990).

[12] For years, courts used the term "substantial similarity" to refer to similarities that indicated both (1) unlawful copying and (2) actual copying. The term "probative similarity" is now the preferred term to analyze the "actual copying" inquiry. 4 *Nimmer*, § 13.01[B] at 12-12; 2 P. Goldstein, *Copyright* § 7.2.1.2 at 7:12 & n. 16 (2d ed. 2000) ("*Goldstein*"); 1 W. Patry, *Copyright Law and Practice* 692 & n. 779 (1994) ("*Patry*").

inferences of access and copying may arise in the face of undisputed direct evidence to the contrary. *Id.* It thus lowered or obliterated the threshold for access and thereby exposed authors' reputations and incomes to unreviewable decisions by juries allowed to speculate about access and copying.

The stakes in assuring the courts' roles as gatekeepers are high. The decision below can have significant economic consequences. For example, sound recordings comprise a $12.5 billion domestic industry, and the foreign sales of U.S. recorded music amount to more than $12 billion, representing approximately sixty percent of the world's consumption of music. Similarly, motion pictures, through theatrical, television and home video exploitation comprise a $32 billion domestic industry, and the foreign sales of U.S. produced motion pictures amount to more than $14 billion, annually.

The composers, authors and other creative artists whose works form the backbone for these burgeoning segments of the economy should not be made to labor under the chilling effect created by standard-free findings of "access" that allow juries to assume the creators of new works have unlawfully "copied" materials, which they never heard or saw.

Such a lax "standard" stands in stark contrast to such copyright policies as, for example, those underlying section 101 which requires a writing to confirm certain work-for-hire situations, and section 204(a) which requires writings to validate transfers of copyright – because of the paramount interest in making ownership of copyright clear and definite to make such property readily marketable.[13] The special evidentiary requirements to protect authors of inadvertent transfers seem

---

[13] *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F. 2d 27, 36 (2d Cir. 1982) (§ 204a); *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F. 2d 410, 412 (7th Cir. 1992) (§ 101); *Kongisberg Intl., Inc. v. Rice*, 16 F. 3d 355, 357 (9th Cir. 1994) (§ 204a).

hollow if jurors can, on a hunch, "transfer" a defendant author's copyright rights to a stranger who only claims to have faxed a submission to an office of a company that is related to another firm that is in the same building as a company which is affiliated to the author's employer in a distant city.[14]

The adverse ramifications of the decision below are substantial, national in scope, harmful to the creative process and chilling to the speech interests of creative artists and their distributors. By deferring to the jury's unbounded speculation about "access," the decision may deter district courts from ruling as a matter of law that meritless claims rest on mere conjecture. An additional rule that would permit a jury to infer access from unprincipled "expert" opinions as to whether similarities compel an inference of actual copying would eliminate "copying" as an element of a copyright claim. Forum-shopping will be encouraged.[15] The Fourth Circuit thus directly contradicts this Court's admonition that "it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994).

---

[14] The recent play and film entitled "Six Degrees of Separation" were based on the conceit that everyone is separated from everyone else in the world by only six acquaintances. The Fourth Circuit's decision would allow a jury to reduce the number to four and to infer all necessary contacts.

[15] Although the conflict in the circuits created by the Fourth Circuit's decision itself merits review, this Court has granted review on important copyright issues even in the absence of such conflicts. *E.g.*, *New York Times Co. v. Tasini*, Dkt. No. 00-201, *cert. granted*, 69 U.S.L.W. 3316 (11/6/2000) (where recent circuit decision threatens to disrupt settled publishing practices); *Mills Music v. Snyder*, 469 U.S. 153 (1984) (holding that publisher was entitled to share in royalties from derivative works under terms of grant from author; petitioner alleged no conflict in the circuits).

II. INTERESTS OF THE AMICI

The Motion Picture Association of America, Inc. ("MPAA"), is a not-for-profit corporation founded in 1922 as the trade association of the American film industry. MPAA promotes the interests of the motion picture industry in the United States by seeking to protect the rights of copyright owners; serving as the advocate for the major producers and distributors of motion pictures, television programs and home video; directing an anti-piracy program to protect U.S. films, television programming and home video throughout the United States; and helping the industry maintain high standards and public goodwill. MPAA represents seven of the largest producers and distributors of filmed entertainment for theatrical, television and home video distribution.[16] MPAA members distribute motion pictures in some eighty countries throughout the world and have been prime beneficiaries of the protections afforded by copyright.

The Recording Industry Association of America ("RIAA") is a trade association representing more than 300 recording companies, including BMG Entertainment, EMI Recorded Music, Sony Music Entertainment, Inc., Warner Music Group, and Universal Music Group. Members of the RIAA manufacture, produce, and/or distribute approximately 90 percent of all legitimate sound recordings in the United States and own the copyrights in those works. One of the RIAA's principal objectives is to support and promote the creative, artistic, free speech, and financial interests of recording artists and the RIAA's member companies. Because piracy of copyrighted works costs artists, producers, songwriters, and others in the

---

[16] The members of the MPAA are Universal Studios, Inc., Paramount Pictures Corporation, Sony Pictures Entertainment, Inc., The Walt Disney Co., Warner Bros., Twentieth Century Fox Film Corp., and Metro-Goldwyn-Mayer, Inc.

recording industry hundreds of millions of dollars annually, the RIAA considers the prevention of illegal copying and distribution of copyrighted sound recordings to be one of its most important tasks.

AFMA is a trade association representing over 150 independent producers and distributors of motion pictures and television programming as well as 27 affiliated financial institutions that provide funding for independent production. AFMA members include: NBC Enterprises, HBO Enterprises, USA Films, Viacom Pictures/ Showtime Networks, Miramax International, Saban Pictures International, New Line Cinema, RKO Pictures, Shooting Gallery, and United Artists Films Limited.

Many members of the amici are authors.[17] 17 U.S.C. § 201(a) & (b). As producers and distributors, they are also frequent targets of infringement claims and suits involving unsolicited submissions[18] to persons not involved in the creative process. Creative and financial investments are immediately threatened by the decision below that indulges fictions of "corporate receipt", inferences of access in the face of denials of receipt, and the

---

[17] In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524, 526 (1994) this Court reminded that defendants in copyright infringement cases are often themselves copyright owners, and that "the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement."

[18] As standards of proof decline, litigation is encouraged. In Los Angeles County alone, in 1999, over 100 lawsuits were reportedly filed claiming infringement. See G. Moran, "Tears in Tinseltown," *California Lawyer*, p. 21 (Apr. 2000). See also, "Harry Potter and the Court Battle Over Creativity", N.Y. Times, National section, pp. 1, 22 (4/1/ 2001) ("Legal challenges . . . over the originality of creative works have proliferated steadily over the last 20 years, partly because of the soaring value of intellectual property in a media-saturated culture.").

fictive substitute for "access" said to arise from "bad science" expert opinions of "striking similarity".

III. REASONS WHY THE PETITION SHOULD BE GRANTED

The circuits have developed case law allowing dismissal of claims as a matter of law where plaintiff failed to show (1) that the works were substantially the same in their protectible expression[19] or (2) that any actionable similarities arose from actual copying. Actual copying may be direct, or it may be circumstantial evidence that certain similarities indicated copying ("probative similarity")[20] and that the creator of defendant's work had a reasonable opportunity to read or hear plaintiff's work ("access") by reason of wide public dissemination[21] or through intermediaries.[22]

---

[19] 3 M. & D. Nimmer, *Nimmer On Copyright* ("*Nimmer*"), § 12.10[B][3], at 12-151 to -156; 4 *Nimmer*, § 13.01[B] at 13.8 to -14.

[20] 3 *Nimmer*, § 12.10[B][2] at 12-148 to -151; 4 *Nimmer*, § 13.01[B], at 13-10 to -13.

[21] *See, e.g., Repp v. Webber*, 858 F. Supp. 1292, 1301-03 (S.D.N.Y. 1994), *reversed on other grounds*, 132 F. 3d 882 (2d Cir. 1997), *cert. denied*, 525 U.S. 815 (1998); *Takeall v. Pepsico, Inc.*, 809 F. Supp. 19, 21 (D. Md. 1992), *aff'd*, 14 F. 3d 596 (4th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994); *Ferguson v. National Broadcasting Co.*, 584 F. 2d 111, 112-13 (5th Cir. 1978); *Selle v. Gibb*, 741 F. 2d 896, 901 (7th Cir. 1984); *Benson v. Coca-Cola Co.*, 795 F. 2d 973, 975 (11th Cir. 1986); 4 *Nimmer*, § 13.02[A] at 13-20 to -21; 1 *Patry*, at 697-98.

[22] *See, e.g., Grubb v. KMS Patriots, L.P.*, 88 F. 3d 1, 3-5 (1st Cir. 1996); *Towler v. Sayles*, 76 F. 3d 579, 582-83 (4th Cir. 1996); *Jason v. Fonda*, 698 F. 2d 966, 967 (9th Cir. 1982); *Herzog v. Castle Rock Entertainment*, 193 F. 3d 1241, 1249 (11th Cir. 1999); *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355-59 (C.D. Cal. 1984) (cited in many circuits); 4 *Nimmer*, § 13.02[A] at 13-19 to -20; 1 *Patry*, at 698-99.

The decision below gives juries the unfettered power to decide what constitutes evidence of access, when access (combined with evidence of probative similarity) raises an inference of copying in fact, and even when some indeterminate degree of similarity substitutes for evidence of copying. Because jurors have no common experience in making such determinations,[23] and the law provides them no firm calculus, the possible impairment of free speech imposes on courts the responsibility of determining the outer limits of the jury's surmise. *See Warner Bros. v. American Broadcasting Cos.*, 720 F. 2d 231, 245 (2d Cir. 1983) affirming summary judgment and holding that:

> "[t]he 'substantial similarity' that supports an inference of copying sufficient to establish infringement of a copyright *is not a concept familiar to the public at large. . . . Courts have an important responsibility in copyright cases to monitor the outer limits within which juries may determine reasonably disputed issues of fact*" (emphases added).

A. The Fourth Circuit's Decision Has So Reduced The Standard To Prove "Access" As To Threaten All Future Attempts To Dispose Of Unmeritorious Claims As A Matter Of Law

Copying in fact, or derivation, focuses on "the factual question whether the defendant, in creating its work, used the plaintiff's material as a model, template, or even inspiration." 4 *Nimmer*, § 13.01[B] at 13-8. Copyright law protects only against unlawful *copying* of a plaintiff's

---

[23] And, as shown below at n. 37, "similarity experts" are better at advocacy than they are at creating a foundation for their opinions, juries are easily misled to defer to experts. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993) (describing "good science".)

work: "Proof of copying is crucial to any claim of copyright infringement because no matter how similar the two works may be (even to the point of identity), *if the defendant did not copy the accused work, there is no infringement.*"[24] *See Mazer v. Stein*, 347 U.S. 201, 218 (1954) ("Absent copying, there can be no infringement.") Accordingly, the issue of *derivation* is critical.

Courts have been imperceptibly lowering the standard of proof of copying over the years. Some earlier decisions held that the *actual* viewing and knowledge of plaintiff's work by the person who composed defendant's work was needed. More recent authority has held that the "reasonable opportunity to view or to copy" raises an *inference* of "access". 4 *Nimmer*, § 13.02[A] at 13-17 (stating that "the opportunity to copy" approach "is perhaps the more prevailing definition of access"); 1 *Patry*, at 696-97. The decision below has reduced the threshold of proof even further, indeed, eliminated it, by reducing "the opportunity to copy" to what is a mere physical possibility. Thus, access and even copying are becoming a fictional requirement of copyright infringement. Similarity is all.

What the "opportunity to copy" definition of access allows, however, is the construction of an inference upon an inference: from evidence of defendant's "opportunity" to view plaintiff's work, the jury may infer that the defendant *actually* viewed it, and from this inference may

---

[24] *Selle v. Gibb*, 771 F. 2d 896, 901 (7th Cir. 1984); *accord Granite Music Corp. v. United Artists Corp.*, 532 F. 2d 718, 720 (9th Cir. 1976); *see also Feist Pubs., Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991); 4 *Nimmer*, § 13.01[B] at 13-10.

further infer (with additional proof of substantial or probative similarity) that the defendant *actually* copied it.[25]

Such inferential proof of copying is really a matter of statistical probabilities:

> The rationale for the inference [of copying in fact] is that access gave the defendant the opportunity to copy the plaintiff's work, and that the similarities between the two works indicate that the defendant in fact seized the opportunity. *Copying in these cases is a question of probabilities. The point of the plaintiff's proof is to demonstrate that, in light of the defendant's access to plaintiff's work and the similarities between the two works, it is more probable than not that the defendant copied from the plaintiff's work.*

2 P. Goldstein, *Copyright*, § 7.2.1 at 7:6 to 7:7 (2d ed. 2001) (emphasis added).

One issue raised by the Petition – the sufficiency of the evidence presented by plaintiff as a matter of law to support the "access" finding of the jury – presents not a factual "credibility" issue[26] but a legal issue, which is reviewed under the same standard applicable to a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Ultimately, whether the evidence in this case was sufficient presented a policy issue for judges, suitable for determination as a matter of law. Thus, the

---

[25] *See Morse v. Fields*, 127 F. Supp. 63, 66 (S.D.N.Y. 1953) (characterizing as "double circumstantial evidence" the fact that the "availability of plaintiff's work is merely some circumstantial evidence of access, and access is merely circumstantial evidence of copying").

[26] A trier's disbelief of a defendant's denial of access does not constitute affirmative substantial evidence of access. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 512 (1984); *Goldhirsh Group, Inc. v. Alpert*, 107 F. 3d 105, 109 (2d Cir. 1997); *Newton v. National Broadcasting Co.*, 930 F. 2d 662, 680 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991).

Fourth Circuit's decision will almost certainly be trumpeted as the standard for what access evidence is sufficient to create a triable issue in the context of a motion for summary judgment and judgment as a matter of law, and on appeals from bench trials as well as jury verdicts.

Entertainment business companies – and individual artists – are regularly stalked by persons intent on making unsolicited submissions.[27] Although it is difficult to create a bright line test concerning "access", courts do create benchmarks on a case by case basis that guide authors, their attorneys, and potential plaintiffs. *See Volokh*, 107 *Yale L.J.* at 2455-59. The Fourth Circuit's decision, lowering the threshold for liability, exemplifies three continuing sources of confusion and irreconcilable results in the case law regarding the access issue.

1. The Decision Is A Dangerous Expansion Of The Corporate Receipt Doctrine

Where a company is involved as a defendant or even as an intermediary in a hypothetical chain of access, the plaintiff often argues that proof that a submission was received at the company acts as a virus which raises an inference that everyone in the company – no matter how large the company, or how far flung its facilities, or differentiated its activities – may be deemed to have promptly received it. *See* 4 *Nimmer*, § 13.02[A] at 13-17. The circuits and the leading cases are split on this subject with some circuits (and the Fourth Circuit in this case), App. A, at 23a-24a, apparently adopting the doctrine[28]

---

[27] Unsolicited submissions arrive – or are allegedly sent – by fax, by mail, by personal delivery, or are supposedly sent like a message in a bottle, through friends, relatives and business associates.

[28] *See Moore v. Columbia Pictures Indus., Inc.*, 972 F. 2d 939, 942 (8th Cir. 1992); *Kamar Intl., Inc. v. Russ Berrie & Co.*, 657 F. 2d 1059, 1060, 1062 (9th Cir. 1981).

and others resisting it.[29] An often-cited district court decision, *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355-57 (C.D. Cal. 1984) explained the fallacy in applying the doctrine to a claim based on submission of an unsolicited script sent to a movie studio that later produced "Animal House".

> [I]n such a business [film production], countless unsolicited scripts are submitted to numbers of individuals on studio lots everyday. Under these circumstances, it is clearly unreasonable to attribute the knowledge of any one individual . . . to every other individual just because they occupy offices on the same studio lot.

In this case, the majority relies on the doctrine in three of the four steps in the supposed chain of circumstances, assuming (1) that a faxed submission to MSA was received by someone at MSA who took a cue from the fax to pass it on to Moag's law office; (2) that alleged receipt by Moag's office meant actual receipt by Moag; (3) that because the Baltimore Ravens had an office in the same building (on a different floor) as Moag, there is a "building receipt" doctrine that caused everyone in the building including the Ravens presumptively to have received the submission; (4) that the Ravens' Baltimore office received the submission and sent the design to the NFLP office in New York; and (5) then, everyone at NFLP's New York office including the designers saw it. App. A, at 17a-22a.

As the dissent pointed out, the majority allowed *inferences* of corporate receipt to constitute substantial evidence even in the face of (1) denials of receipt by

---

[29] *Grubb v. KMS Patriots, L.P.*, 88 F. 3d 1, 3-5 (1st Cir. 1996); *Morrissey v. Procter & Gamble Co.*, 379 F. 2d 675 (1st Cir. 1967); *Dimmie v. Carey*, 88 F. Supp. 2d 142, 146-49 (S.D.N.Y. 2000); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 547-48 (S.D.N.Y. 2000); *Novak v. National Broadcasting Co.*, 752 F. Supp. 164 (S.D.N.Y. 1990).

MSA's office, by Moag, by Moag's office, by the Ravens, by the NFLP office, by the NFLP designers, and (2) the existence of a practice by Moag not to forward materials to the Ravens, and direct evidence that the Ravens sent no materials to NFLP during the relevant period. See App. A at 17a-22a.[30]

2. The Decision Improperly Allows Inferences Of "Access" That Are Contradicted By Direct Denials Of Receipt And Practices Preventing Receipt To Constitute Substantial Evidence of Copying

There is no reason to change the laws of evidence for copyright infringement cases. Thus, this Court's admonition that inferences may not be indulged in the face of uncontradicted direct evidence that contradicts the proposed inference, *Pennsylvania R.R. Co. v. Chamberlain*, 288 U.S. 333, 341 (1931), should have been determinative of the outcome below. This case then illustrates a continuing problem where a jury is allowed to draw inferences of access that are flatly contradicted either because of a direct denial of a receipt of a submission or because of practices that prevented the fact assumed by the inference, in this case acceptance and transmittal of submissions in contradiction to firewalls intended to prevent any such access. Not only does the Fourth Circuit's approach contradict this Court's rule on the permissible of inferences, note 30, *supra*, but it creates conflicts with established case law of other circuits.[31] This issue is

---

[30] Indulging such inferences in the face of uncontradicted evidence conflicted with a decision of this Court. *Pennsylvania R.R. Co. v. Chamberlain*, 288 U.S. 333, 341 (1931).

[31] *Grubb v. KMS Patriots, L.P.*, 88 F. 3d 1, 3-5 (1st Cir. 1996); *Repp v. Webber*, 858 F. Supp. 1292, 1301-03 (S.D.N.Y. 1994), *reversed on other grounds*, 132 F. 3d 882 (2d Cir. 1997); *Towler v. Sayles*, 76 F. 3d 579, 582-83 (4th Cir. 1996); *Takeall v. Pepsico*, 809

obviously important to *amici* who are encouraged to create such firewalls and are discouraged to learn that some courts ignore them.

B. The Fourth Circuit's Alternative Holding That "Striking Similarity" Raises An Inference Of Access And Of Copying Is "Bad Science" And Threatens To Eliminate "Copying" As An Element of Copyright Infringement.

It is a fundamental tenet of copyright that similarity does not alone create liability; there is no infringement in the absence of copying. *Mazer v. Stein*, 347 U.S. at 218. Yet, the decision below held, in the alternative, that evidence of "striking similarity" may create an inference of access, which would support a finding of copying, even where there is no other evidence of access. App. A, at 8a-9a. In doing so, the Fourth Circuit purported to distinguish itself from the Fifth Circuit which allows copying to be proven without a showing of access where striking similarity precludes the possibility of independent creation.[32]

F. Supp. 19, 21 (D. Md. 1992), *aff'd*, 14 F. 3d 596 (4th Cir. 1993); *Peel & Co., Inc. v. Rug Market*, 238 F. 3d 391, 394-95 (5th Cir. 2001); *Ferguson v. National Broadcasting Co.*, 584 F. 2d 111, 113 (5th Cir. 1978); *Selle v. Gibb*, 741 F. 2d 896, 901 (7th Cir. 1984); *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355-59 (C.D. Cal. 1984) (followed in many circuits); *Herzog v. Castle Rock Entertainment*, 193 F. 3d 1241, 1251, 1256 (11th Cir. 1999); *Benson v. Coca-Cola Co.*, 795 F. 2d 973, 975 (11th Cir. 1986). And, see *Ellis v. Diffie*, 177 F. 3d 503 (6th Cir. 1999) (no "clear error" in rejecting speculative evidence of access through intermediary record executive).

[32] *Accord*: Since "independent creation" simply means that defendant did not copy from plaintiff's work, *Keeler Brass Co. v. Continental Brass Co.*, 862 F. 2d 1063, 1066 (4th Cir. 1988); *Latman*, at 704-05, this is of course tautological and reduces the rule to an assertion that some types of similarity implicitly must have resulted from copying plaintiff's work.

App. A at 8a, citing *Ferguson v. National Broadcasting Co.*, 584 F. 2d 111, 113 (5th Cir. 1978).[33] But, even though the Fourth Circuit states that "access remains an indispensable part of a copyright infringement claim", the Fourth Circuit, just like the Fifth Circuit, dispenses with the need to prove "access" by simply stating that similarity – one half of the equation creating an inference of actual copying – is one way to demonstrate access. *Ibid.*

Decisions of other circuits still require some evidence of access, no matter how slight, before the "striking similarity" doctrine may raise an inference of copying.[34] Even so, the use of "striking similarity" to create an inference of access remains "a controversial method". 1 *Patry*, at 700.

Worse, the doctrine as commonly employed is just "bad" science. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993) (describing "good science").[35]

An early decision, *Keene v. Wheatley*, 14 F. Cas. 180, 195 (C.C.E.D. Pa. 1861) (No. 7,644), illustrates the "scientific" rationale for the "striking similarity" doctrine:

---

[33] *Accord*: *Baxter v. MCA, Inc.*, 812 F. 2d 421, 423-24 & n. 2 (9th Cir.), *cert. denied sub nom., Williams v. Baxter*, 484 U.S. 954 (1987).

[34] 4 *Nimmer*, § 13.02[B] at 13-22; *Selle*, 741 F. 2d at 902 (emphasis added) (even "striking similarity" cannot create an inference of copying without *"some minimum threshold of proof which demonstrates that the inference of access is reasonable."*); *accord*: *Grubb*, 88 F. 3d at 5-6. *See* R. Osterberg, "Striking Similarity and the Attempt to Prove Access and Copying in Music Plagiarism Cases," 2 *J. Copyright, Ent. & Sports L.* 85 (1983).

[35] Even if the expert opinion were not strictly speaking about "scientific knowledge," this Court applies the gatekeeping function as well to testimony based on "technical" and other "specialized knowledge." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

> [A] prolonged series of thoughts or statements, each one in itself simple, cannot have been expressed originally by two persons in the same words arranged in the same succession. In language of a mathematician, such a coincidence is infinitely improbable. It has, from experience, been long recognized as absolutely impossible.

Thus, the striking similarity doctrine assumes a scientific basis – statistics – and the assumption that experts or even laypersons may reach a demonstrably rational decision about such a conclusion. But, neither in this case nor in any other case[36] where the doctrine has been invoked, has there been any expert yet to explain for the trier of fact (1) how many possible differences there could be in two works produced at the same time about the same subject matter, and (2) at what point the number or nature of similarities (and at what level of similarity) one would conclude with certainty that statistically the similarities were other than the result of coincidence, reliance of prior common sources or independent creation.[37] Instead, by allowing experts to casually testify about such statistical judgments, the case law undermines the fundamental copyright principle that even if two works are identical, they are not infringing unless one has been copied from the other. *Mazer v. Stein*, 347 U.S. at 218.

---

[36] One possible exception is proof that a defendant has copied errors in plaintiff's work. 4 *Nimmer*, § 13.03[C] at 13-74 to -75. In *Financial Information, Inc. v. Moody's Investors Service*, 751 F. 2d 501, 503, 509 (2d Cir. 1984), the court approved expert testimony by a mathematician that defendants' copying of planted errors showed a 95% probability of copying.

[37] Nor is there any showing by experts that their "methodology" is reliable, subject to peer review, has a known or potential error rate or widespread acceptance within a relevant scientific community. *Daubert*, 509 U.S. at 593-95. One result is that experts have learned to sprinkle their testimony about similarities with the word "striking."

The decision below did not rely on any finding of literal copying but rather on the selection, coordination and arrangement of "several public domain elements which are not protectible." App. A at 10a. Indeed, both drawings involve a shield with a B for "Baltimore" and some symbols drawn from the Maryland State flag, and wings no doubt bespeaking the association with a "raven". In the face of such commonplace elements, it is not clear how any expert could plausibly contend that the similarities could *only* be the result of copying rather than reliance on common sources, independent creation or coincidence.

IV. CONCLUSION

The Fourth Circuit's decision threatens to subject creative efforts, speech interests, and substantial investments to a judicial policy that allows unpredictable and unprincipled legal decisions, with attendant deleterious results to a national copyright policy. Too much speech will be wrongly punished and too many reputations will be sullied while the Fourth Circuit's decision percolates through the federal courts, even if the Fourth Circuit ultimately tries in later decisions to modify or correct its misstep. The Petition for a writ of certiorari should be granted.

DATED: April 27, 2001

Respectfully submitted,

Louis P. Petrich
David Aronoff
Leopold, Petrich & Smith

Attorneys for Amici Curiae Motion Picture Association of America, Inc., Recording Industry Association of America, Inc., and American Film Marketing Association